Denied
313 U.S. 560
(1)

FILED
MAR 3 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

65

OCTOBER TERM, 1940.

No. 807

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DAR-DEP

EDWARD J. DARBY & SON, INC.,
Petitioner,

against

WALTER J. ROTHENSIES, Collector of Internal Revenue.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

G. PLANTOU MIDDLETON,
939 Land Title Bldg., Phila., Pa.
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Supreme Court of the United States

October Term, 1940. No. .

Edward J. Darby & Son, Inc.,

Petitioner,

against

Walter J. Rothensies, Collector of Internal Revenue.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

SUMMARY STATEMENT OF MATTER INVOLVED.

The matter involved is the construction of sec. 609 of the Revenue Act of 1932 (47 Stat. 169) (since repealed) which levied an excise tax upon the sale of forty-one named articles incident to sports or games (naming as to golf only bags, balls and clubs) and upon "games and parts of games * * * and all similar articles commonly or commercially known as sporting goods." The Petitioner made or sold no bags, balls or clubs or other playing implements, but did make and sell certain equipment for golf courses, of which the Collector taxed hole

cups, poles and markers, and exempted ball retrievers, hole cutters, golfball washers and golf bag racks. The Petitioner sued for refund and obtained judgment in the District Court, which the Circuit Court of Appeals reversed.

BASIS OF JURISDICTION.

The jurisdiction of this Court is invoked under sec. 240 of the Judicial Code (28 U. S. C. sec. 347). The date of the judgment sought to be reviewed is December 3, 1940.

QUESTIONS PRESENTED.

When a statute selects for tax specific articles used in games or sports, with a terminal clause taxing "games and parts of games * * * and all similar articles commonly or commercially known as sporting goods," can it be applied to other unenumerated parts of the named games, or to other articles not similar to those specifically enumerated?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The decision of the Circuit Court of Appeals in the instant case is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of *Brunswick-Balke-Collender Company* v. *Carter H. Harrison, Collector of Internal Revenue,* 116 F. 2d 786 (December 21, 1940) involving the same act and section, and, *inter alia,* the identical point (latter end of opinion).

The Circuit Court of Appeals in the instant case has by resort to general terms and in disregard of the preceding specific enumerations, extended the terms of a

taxing act beyond its fair intent and meaning, in conflict with the following applicable decisions of the Supreme Court:

White v. *Aronson,* 302 U. S. 16;
Gould v. *Gould,* 245 U. S. 151;
U. S. v. *Stever,* 222 U. S. 167;
McBoyle v. *U. S.,* 283 U. S. 25;
Iselin v. *U. S.,* 270 U. S. 245.

SUPPORTING BRIEF.

The text of the statute, arranged to facilitate analysis, is set out in the opinion of Judge Kirkpatrick in the District Court, appearing in the record. As he there points out, the articles taxed are dealt with under three classifications: (1) those specifically enumerated, (2) those embraced by the general terminal words "games and parts of games," and (3) those referred to by the general expression "and all similar articles commonly or commercially known as sporting goods."

The articles here taxed are of course not specifically enumerated in the Act.

The general term "games and parts of games" embraces only games and parts as to which no specific enumeration has been made. The *expressio unius* rule forbids the inclusion of parts of a particular game other than the parts of that game specifically enumerated.

The term "similar articles commonly or commercially known as sporting goods" necessarily and *ex vi termini* means articles similar to those listed. Hole cups, flag poles and markers used as equipment on a golf course have not the remotest similarity in appearance, function or use to golf bags, clubs or balls used as playing implements (6th Finding of Fact).

The Circuit Court of Appeals entirely disregards the rules of *expressio unius* and *eiusdem generis.* In its own words,

> "* * * we state that the phrase 'games and parts of games' is itself a kind of catch-all or basket clause intended to bring within the purview of the taxing act all articles designed and intended for games whether included in the thirteen categories or not."

—and whether or not they are (as the statute itself specifically requires) similar to those named. This is directly contrary to the settled rules, particularly applicable to tax acts, applied by the Supreme Court in the cases above cited.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decree of the Circuit Court of Appeals for the Third Circuit be reversed by this Honorable Court, and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

G. PLANTOU MIDDLETON,
Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 807

EDWARD J. DARBY & SON, INC., PETITIONER

v.

WALTER J. ROTHENSIES, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 30–33) is not reported. The opinion of the Circuit Court of Appeals (R. 36–37) is reported in 116 F. (2d) 268.

JURISDICTION

The judgment of the Circuit Court of Appeals was filed December 3, 1940. (R. 37.) The petition for a writ of certiorari was filed on March 3, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether hole cups, flag poles and markers, designed for use on golf links, are subject to the excise tax imposed by Section 609 of the Revenue Act of 1932 on "games and parts of games" and on "all similar articles commonly or commercially known as sporting goods."

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the statute and regulations involved are printed in the Appendix.

STATEMENT

Section 609 of the Revenue Act of 1932 (set out in the Appendix) levies a tax on numerous specific articles used in games or sports, on "games and parts of games," and on "all similar articles commonly or commercially known as sporting goods."

Petitioner manufactures and sells equipment for use in the game of golf. Respondent assessed a tax against it under Section 609 of the Revenue Act of 1932 with respect to flag poles, hole cups and markers used for golf courses. (R. 26, 32.) Petitioner paid the tax involved and then sought a refund, which was denied. (R. 26–27, 30.)

Petitioner thereupon sued in the District Court for recovery of the taxes paid, and obtained a judgment for the full amount. (R. 33.) The Circuit Court of Appeals for the Third Circuit reversed the decision of the District Court and entered a judgment for the respondent. (R. 37–38.)

ARGUMENT

1. Petitioner cites *Brunswick-Balke-Collender Co.* v. *Harrison,* 116 F. (2d) 786 (C. C. A. 7th), as in conflict with the decision below. In that case it was held that Section 609 is not applicable to bowling alleys. But, as stated in the opinion in the *Brunswick-Balke-Collender* case, the two decisions are entirely consistent: the instrumentalities with which a game is played are different from the courts, floors, alleys and so forth on which such games are played, and in the *Brunswick-Balke-Collender* case the undisputed evidence showed that bowling alleys are never sold by sporting goods stores while in the present case the undisputed evidence shows that all sporting goods concerns list the equipment involved herein as part of their stock in trade. (R. 19.) Furthermore, in *Chicago Flag & Decorating Co.* v. *United States,* decided on March 10, 1941, the Circuit Court of Appeals for the Seventh Circuit held that flags, made for use as golf flags, are within the purview of Section 609. The court stated that its holding was readily distinguishable from its decision in the *Brunswick-Balke-Collender* case, and cited the decision of the court below in the instant case as being squarely in point.

2. Petitioner's only other contention, that the court below has extended the terms of the Act beyond its fair intent and meaning, is but an assertion that the decision below is erroneous, and shows no ground for certiorari.

CONCLUSION

The decision below presents neither a conflict nor a question of general importance, and the petition should therefore be denied.

Respectfully submitted.

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Special Assistants to the Attorney General.

MARCH 1941.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 609. TAX ON SPORTING GOODS.
>
> There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: Tennis rackets, tennis racket frames and strings, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles, polo mallets, baseball bats, gloves, masks, protectors, shoes and uniforms, football helmets, harness and uniforms, basket ball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, chess and checker boards and pieces, dice, games and parts of games (except playing cards and children's toys and games); and all similar articles commonly or commercially known as sporting goods.

Treasury Regulations 46, promulgated under the Revenue Act of 1932:

> ART. 53.[1] *Scope of Tax.*—The tax attaches to sales by the manufacturer of the articles enumerated in section 609 as well as to all similar articles commonly or commercially known as sporting goods, games, and parts of games (except playing cards and children's toys and games).

[1] This regulation was amended in 1938 in a manner not material herein. T. D. 4853, 1938–2 Cum. Bull. 383.

The term "sporting goods" includes all articles of the same general character as those specifically named, the purpose of which is primarily for use either indoors or outdoors in connection with a game or sport.

The term "games" includes games of skill or chance and every contrivance, device, or combination of articles which is designed to furnish sport, recreation, or amusement. Games of the type ordinarily played or used by adults, as distinguished from games designed for the use of children, are subject to the tax.

ART. 54. *Sporting Goods.*—The following list, while not exhaustive, is illustrative of the type of articles subject to tax as sporting goods: All paraphernalia, equipment, and uniforms specially designed for or commonly used in athletic contests, archery, baseball, football, basketball, cricket, curling, and similar games or contests, canoeing, bowling, noncommercial fishing (whether or not designed for, or commonly used in, commercial fishing), fencing, tennis, golf, boxing, etc.

U. S. GOVERNMENT PRINTING OFFICE: 1941